

APPEAL NO. 051708  
FILED SEPTEMBER 13, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 1, 2005. The hearing officer resolved the disputed issues by deciding: (1) that the respondent (claimant) sustained repetitive trauma injuries in the form of a right carpal tunnel injury and a right cubital tunnel injury in the course and scope of her employment; (2) that the date of injury (DOI) for the right carpal tunnel injury is (Injury 1); (3) that the DOI for the right cubital tunnel injury is (Injury 2); (4) that the appellant (carrier) did not specifically contest compensability on the issue of timely reporting pursuant to Section 409.022 and 28 TEX. ADMIN. CODE § 124.2 (Rule 124.2) and the carrier's defense is limited to the defense of no injury in the course and scope of employment listed on the first Notice of Denial of Compensability (PLN-1); (5) that although the claimant did not timely report the right carpal tunnel injury and did not have good cause for her failure to do so, the carrier is not relieved of liability under Section 409.002; and (6) that as a result of the compensable right carpal tunnel injury, the claimant had disability beginning on October 13, 2004, and continuing through the date of the CCH. The carrier appealed, disputing the determinations that the claimant sustained a compensable repetitive trauma injury; that the carrier is not relieved from liability under Section 409.002; and that the carrier did not timely raise the timely reporting defense under Section 409.022 and Rule 124.2. The carrier additionally appealed the determinations regarding disability and that the DOI for the right cubital syndrome is (Injury 2). The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that she worked for the employer as a pizza cook. She described her various job duties, which included using a roller to prick holes in the prepared pizza dough, brushing the dough with oil, putting the sauce and various toppings on the pizza, and dicing the ingredients. She testified that the number of pizzas she makes each day varied, but normally she would make between 60 and 70 pizzas per day.

**COMPENSABLE REPETITIVE TRAUMA INJURY**

The carrier contends that the claimant failed to offer sufficient evidence regarding the frequency, duration, and nature of her work duties to show that such duties were physically repetitious and traumatic such that they would cause her claimed injury. Section 401.011(36) defines repetitive trauma injury as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." To recover for an occupational disease of this type, one must not only prove that

repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). The carrier correctly notes that we have stated that, at a minimum, proof of a repetitive trauma injury should consist of some presentation of the duration, frequency, and nature of activities alleged to be traumatic. Appeals Panel Decision (APD) No. 960929, decided June 28, 1996.

An EMG/NCV dated (Injury 2), was in evidence, which listed as an impression that the claimant had moderate to severe right cubital tunnel syndrome. The hearing officer assessed the medical evidence, some of which specifically addressed causation, the length of the claimant's employment, as well of the claimant's detailed description of her job duties. Whether the claimant sustained a compensable injury is a factual question for the hearing officer to resolve. The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility that is to be given to the evidence. Section 410.165(a). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We have reviewed the injury determination and conclude that the hearing officer's decision that the claimant sustained a compensable repetitive trauma injury in the form of right carpal tunnel and right cubital tunnel syndromes is supported by sufficient evidence.

### **DATES OF INJURY**

The DOI was specifically an issue before the hearing officer. Section 401.011(34) provides that an occupational disease includes a repetitive trauma injury, which is defined in Section 401.011(36). Section 408.007 provides that the DOI for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. There was no contention at the CCH that the claimant had more than one claim pending, or that a different incident or mechanism of injury caused harm to different areas of the claimant's right upper extremity. Rather, the hearing officer specifically found that both the claimant's right carpal tunnel injury and right cubital tunnel injury were the result of the claimant's overuse of her right arm and hand in preparing pizzas during the employer's summer camp programs. However, the hearing officer found a DOI for the right carpal tunnel syndrome injury and a separate DOI for the right cubital tunnel syndrome injury. It was error for the hearing officer to find separate dates of injury for the right carpal tunnel syndrome and the right cubital tunnel syndrome rather than a single DOI for the claim at issue. We reverse the hearing officer's determination that the DOI for the right cubital tunnel syndrome is (Injury 2). There is sufficient evidence to support the hearing officer's finding that the claimant knew or should have known that she sustained an injury to her right hand due to the overuse of her right hand by (Injury 1). The hearing officer was persuaded that the claimant sustained injury to her right upper extremity.

The claimant was initially diagnosed with carpal tunnel syndrome. A subsequent diagnosis of right cubital tunnel syndrome does not create a new DOI. We reverse the hearing officer's determination that the DOI for the right cubital tunnel syndrome is (Injury 2). We render a new determination that the claimant's DOI for her compensable repetitive trauma injury is (Injury 1).

### **TIMELY NOTICE TO EMPLOYER**

The hearing officer's finding that the claimant did not act as a reasonably prudent person would have acted under the same or similar circumstances in failing to report a work-related injury to her employer until October 11, 2004, was not appealed. The carrier contends however that it raised its defense of the claimant's failure to timely report at the time it became aware of newly discovered evidence that could not have been reasonably discovered at an earlier date. In general, the carrier is limited to and bound by the grounds set forth in the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) it files, unless the new defense is based on newly discovered evidence. Section 409.022(b); APD No. 960949, decided June 28, 1996. We note that the PLN-1 is the replacement for the TWCC-21. The carrier does not contend that it raised this defense timely in its PLN-1 but rather argues that it raised the issue as soon as it became aware of newly discovered evidence that could not have been reasonably discovered at an earlier date. The hearing officer noted that the carrier appears to have ignored medical records easily available to it and did not interview the claimant before disputing the claim. There was sufficient evidence to support the hearing officer's finding that prior to the claimant's appearance at the May 11, 2005, benefit review conference, the carrier had readily available evidence that the claimant may not have timely reported the alleged injury to the employer and had failed to reasonably investigate the instant claim. We affirm the hearing officer's determination that the carrier did not specifically contest compensability on the issue of timely reporting pursuant to Section 409.022 and Rule 124.2 and the carrier's defense is limited to the defense of no injury in the course and scope of employment listed on the PLN-1 and that the carrier is not relieved from liability under Section 409.002 because of the claimant's failure to notify her employer pursuant to Section 409.001.

### **DISABILITY**

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Although conflicting evidence was presented on the disability issue, we conclude that the hearing officer's determination that the claimant had disability resulting from the compensable injury beginning on October 13, 2004, and continuing through the date of the CCH is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, *supra*.

We affirm the hearing officer's determinations that the claimant sustained a compensable repetitive trauma injury in the form of right carpal tunnel and right cubital tunnel syndromes; that the carrier did not specifically contest compensability on the

issue of timely reporting pursuant to Section 409.022 and Rule 124.2 and the carrier's defense is limited to the defense of no injury in the course and scope of employment listed on the PLN-1; that the carrier is not relieved from liability under Section 409.002 because of the claimant's failure to notify her employer pursuant to Section 409.001; and that the claimant had disability beginning on October 13, 2004, and continuing through the date of the CCH. We reverse the hearing officer's determination that the DOI for the right cubital tunnel syndrome is (Injury 2), and render a new determination that the claimant's DOI for the claimant's compensable repetitive trauma injury is (Injury 1).

The true corporate name of the insurance carrier is **THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
800 BRAZOS, SUITE 750, COMMODORE 1  
AUSTIN, TEXAS 78701.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Robert W. Potts  
Appeals Judge